

DEC 27 2007

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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD SARMENTO,

Plaintiff - Appellant,

v.

HENRY SCHEIN, INC.,

Defendant - Appellee.

No. 06-15258

D.C. No. CV-03-00355-LRH/VPC

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Larry R. Hicks, District Judge, Presiding

Argued and Submitted December 7, 2007  
San Francisco, California

Before: FARRIS, BEEZER, and THOMAS, Circuit Judges.

Gerald Sarmiento appeals the district court's grant of summary judgment in favor of Henry Schein, Inc. on his Americans with Disabilities Act claims.

Sarmiento contends that genuine issues of material fact exist as to whether he has made a prima facie showing that he is "disabled" under the ADA. We review a

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<sup>\*</sup> This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

grant of summary judgment de novo. *Walton v. U.S. Marshals Serv.*, 492 F.3d 998, 1011 (9th Cir. 2007). We have jurisdiction under 28 U.S.C. § 1291. We affirm.

Sarmiento contends that he is disabled under all three definitions of “disability” in the ADA. *See* 42 U.S.C. § 12102(2)(A)-(C). The record fails to support Sarmiento’s assertion.

There is no genuine issue of material fact as to whether Sarmiento was “disabled,” though he suffered from lifting restrictions as a result of a back injury. *See* 42 U.S.C. § 12102(2)(A). We have previously determined that a lifting restriction impairing an employee’s ability to work only one particular job is not “substantially limiting” and therefore not a “disability” under § 12102(2)(A). *Thompson v. Holy Family Hosp.*, 121 F.3d 537, 540-41 (9th Cir. 1997).

Sarmiento’s “inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.” 29 C.F.R. § 1630.2(j)(3)(i); *see Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 491 (1999).

There is no genuine issue of material fact as to whether Sarmiento has a record of disability. *See* 42 U.S.C. § 12102(2)(B). He does not have a “history of” nor has he been “misclassified as having, a substantially limiting impairment.” *Walton*, 492 F.3d at 1011 (citing 29 C.F.R. § 1630.2(k)). Schein’s records reflect

nothing more than weight lifting, bending, and pushing restrictions. Even considered in conjunction with his past neck injury and heart surgery, the lifting restrictions do not constitute substantial limitations on the major life activity of work. *See Thompson*, 121 F.3d at 540-41.

The record reflects that Sarmiento is simply unable to meet a particular job performance standard. *See Walton*, 492 F.3d at 1006 (citing *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516, 524 (1999)). There is no evidence in the record that Sarmiento was “regarded as” having an ADA-qualifying impairment. 42 U.S.C. § 12102(2)(C). These lifting restrictions do not constitute substantial limitations on the major life activity of work. *See Thompson*, 121 F.3d at 540-41.

Since Sarmiento is not “disabled” under the ADA, we do not reach his other ADA-related claims.

**AFFIRMED.**